Supreme Court, U.S.
FILED
JAN 7 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-911

EDWARD E. KOEHL, Administrator of the Estate of Carol E. Koehl, Deceased,
HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased,
HENRY NEUHAUSSER, RONALD ISON, EDNA ISON SCOTT, JOHN A. MUSCOVIN, aka JON A. MUSCOVIN, and AMELIA MUSCOVIN,

Petitioners,

v.

UNITED STATES FIRE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Is a constitutional issue, appropriate for consideration on the merits by the Supreme Court of the United States, presented where the decisions of the trial and appellate

courts of the State of Ohio turned upon such concepts as the proper construction of the language of a policy of automobile liability insurance, a state's interpretation of the doctrine of "the law of the case" and the appealability or non-appealability of an order of a state's intermediate appellate court?

STATEMENT OF THE CASE

The Statement of the Case and Statement of Facts appearing on pages 7-12 of the Petition for a Writ of Certiorari is accepted, in part, by respondent. However, there are several significant errors and omissions which we will point out.

Common Pleas Court, First Time

Contrary to what is implied on page 7 of petitioners' brief, the stipulation entered into in the Hamilton County Common Pleas Court by all of the parties was not designated a "partial" stipulation. The word "stipulation" was entirely unmodified, and the language of that stipulation was entirely silent as to whether it did, or did not, contain all of the evidence necessary to determine whether the policy issued by United States Fire Insurance Company to the Muscovins covered the judgments previously rendered against Amelia Muscovin and Jon Allen Muscovin.

As far as respondent is concerned, the stipulation does contain all that any court would ever need to resolve, as a matter of law, the coverage issue: first, the acknowledgment of the total lack of permission to Jon Allen Muscovin to operate the Koehl automobile and, secondly, the language (including the pagination and indentation) of the U. S. Fire policy, which appears on page 10 of the petitioners' brief. As we will point out in some detail later

in this brief, each and every court which has ever been called upon to interpret that policy format and language has ruled, as a matter of law, that the only possible construction which could be made was precisely that construction made by the courts below in the case at bar.

There is an implication, on pages 7, 8 and 11 of petitioners' brief, that Judge William R. Matthews of the Hamilton County Common Pleas Court rushed precipitously into a totally unexpected and unwarranted decision following the filing of the stipulation. In this connection, we point out that, after the stipulation had been filed and prior to the rendition of Judge Matthews' opinion, the parties filed briefs in support of their respective positions, our brief asserting precisely the same construction of the policy which was ultimately adopted by the court. The briefs of the other parties took precisely the opposite position, and without any suggestion that it would be necessary to resort to the reception of evidence in order to reach such a determination. It was our understanding at that time that the court was to pass to a consideration of the case as a matter of law if it felt that this was possible under the stipulated facts, and this is what Judge Matthews did.

It was only after the circulation of Judge Matthews' opinion that petitioners suddenly discovered that the determination of the coverage question needed some proceedings beyond what had been stipulated to and thoroughly briefed. One is tempted to suspect that the protestations for a need of a "hearing" and for "testimony" constituted an afterthought in the wake of Judge Matthews' decision.

Court Of Appeals Case No. C-73253, (First Appeal)

On page 8 of their brief, petitioners choose to omit any mention of the positions which they took in their first appeal to the First District Court of Appeals. That appeal was not confined to "due process" grounds. On the contrary, petitioners devoted as much, or more, of their briefing efforts to their claim that the U. S. Fire policy should have been construed by the Common Pleas Court, presumably as a matter of law and based upon the same stipulated facts, in a manner exactly opposite from that court's ruling. Among other arguments, petitioners contended that various established rules of English grammar required such an interpretation. Excerpts from "A Dictionary of Modern English Usage" were made an appendix to one of petitioners' briefs. However, it should be noted that, in none of the briefs filed in the first appeal to the Court of Appeals, did any of petitioners ever state that he had *evidence* to present to the Court of Common Pleas on the proper *construction* of the policy; nor did the petitioners set forth in any of those briefs any Assignment of Error which urged reversal because of a denial to allow testimony from grammarians.

Pursuant to Rule 12A of the Ohio Rules of Appellate Procedure (set forth in the footnote on page 24a of petitioners' brief), the First District Court of Appeals was required to pass upon all claimed errors, including the claimed error in policy construction. It did so by adopting the same construction of what it held to be the "unambiguous" language of the U. S. Fire policy which has been, and continues to be, unanimously followed by the cases cited on pages 16-17 hereof (12a-14a of petitioners' brief). Nevertheless, the Court of Appeals reversed and remanded, but only because petitioners contended (13a of petitioners' brief):

> ". . . that they have additional evidence beyond that stipulated, regarding *negotiations* surrounding the issuance of the insurance policy by U. S. Fire to the Muscovins." (emphasis supplied)

At least as they were then perceived by the Court of Appals, petitioners had *not* argued that they had ever intended to introduce evidence varying the policy's *construction,* only that they had evidence, in the words of the Court of Appeals, "varying the policy *language.*" (emphasis supplied)

The entry journalized by the Court of Appeals in Case No. C-73253 tracked the dual holdings in its opinion, specifically stating that (17a of petitioners' brief):

> ". . . we find the assignments of error relative to the trial court's construction of the disputed portions of the insurance policy issued by U.S. Fire to Amelia C. Muscovin and Jon Allen Muscovin have no merit and are overruled."

Filings were then made by petitioners which they have chosen not to print as one of the appendices to their brief in this Court, identically worded motions for reconsideration, one of which is Appendix A of this brief. In those motions, petitioners urged the Court of Appeals to strike portions of its decision and judgment, or to modify them (1a of respondent's brief):

> ". . . so as to include no determination as a matter of law that the language of the policy of the United States Fire Insurance Company, in the absence of modification by the agent or broker, excluded coverage of Jon Allen Muscovin, and his mother, Amelia Muscovin."

In the memoranda supporting the motions for reconsideration, petitioners suggested to the Court of Appeals,

for the first time in any brief or memorandum, the possibility of expert testimony on grammatical construction (3a of Respondent's Brief). Petitioners also asserted the argument that all proceedings in the Common Pleas Court were "void" (3a of Respondent's Brief). The Court of Appeals overruled the motions for reconsideration (19a of petitioners' brief), after which petitioners, even though they clearly understood the ramifications of the limited remand by the Court of Appeals, elected not to attempt an appeal to the Supreme Court of Ohio, an appeal which could have set the stage for the invocation of the jurisdiction of this Court if the petitioners desired to assert to this Court that the limited remand by the Ohio Court of Appeals was, somehow, constitutionally invalid.

Common Pleas Court, Second Time

Beginning at page 8 of their brief, petitioners place great emphasis on the affidavits of the four grammarians. As initially worded, two of those affidavits demonstrated that the affiants had been given a completely inaccurate policy format to analyze, a matter of considerable importance in that the indentation of the exclusion language has been deemed a decisive consideration by several appellate courts. When this blunder was pointed out, additional affidavits from the grammarians were hastily filed. It was as if a highly touted medical expert had said that the presence of fever in the patient showed that he had a certain disease and then, when told that the patient did not have a fever, quickly proclaimed that the absence of fever led him to the same conclusion.

Petitioners are in error when, on page 8 of their brief, they imply that no other affidavits were filed in support of, or in opposition to, the cross motions for summary judgment. Appendix B hereof is the affidavit of the insured,

Alfred J. Muscovin, filed by petitioners. It affirmatively establishes the exact opposite of what petitioners had told the Court of Appeals they were going to prove, if given the chance. What Mr. Muscovin said was that he definitely did *not* seek to secure some different kind of automobile liability coverage for his son, but specifically instructed the agent, Robert W. Vogt, to put the son on the parents' existing policy, that is, the policy which already contained the same standard exclusion which (like all automobile liability policies) requires the permission of the vehicle owner before extending coverage for the use of a non-owned vehicle (9a-11a of respondent's brief).

Appendix C hereof is an affidavit filed by respondent, that of Mr. Vogt, the salient points of which are that he did endorse the Muscovin policy to name the son as an additional operator; that this addition made the son "fully covered" in the sense that it provided him with as much protection as was possible under any kind of automobile liability policy; and that a non-owned automobile policy (a so-called "owner's policy") could have been written at that time but would have contained essentially the same exclusion as that which was in the Muscovin policy (12a-13a of respondent's brief).

Court of Appeals No. C-77839 (Second Appeal)

We believe that it is appropriate to make some mention of the rationale of the Court of Appeals' affirmance. That court emphasized its obligation in the previous appeal to pass upon the policy construction Assignment of Error presented to it by petitioners (24a of petitioner's brief). It also pointedly reminded petitioners of their failure to appeal the judgment in Case No. C-73253 (26a and 27a of petitioners' brief), thus making it clear that the judgment in that case had been a final, appealable order. Therefore,

petitioners could have appealed that order to the Supreme Court of Ohio and, failing there, to this Court. However, they chose not to do so.

The opinion in Case No. C-77839 also held that, after the previous limited remand, the trial court was bound by the unappealed ruling on proper policy construction, in other words, that the doctrine of "the law of the case" controlled (27a of petitioners' brief).

Finally, the Court of Appeals specifically re-asserted its holding that respondent's position on the substantive policy construction issue was correct and that both Mrs. Muscovin and her son were subject to the exclusionary clause requiring the vehicle owner's permission (27a of petitioners' brief). Footnote 3 of its opinion reflected an awareness that, under Ohio case law on policy construction, (28a of petitioners' brief):

> ". . . the interpretation of a printed instrument often is exclusively for the court."

The same footnote also acknowledged that (27a of petitioners' brief):

> ". . . much authority exists justifying the original trial court's construction of the policy."

By dismissing petitioners' appeal and overruling their motion to certify, the Supreme Court of Ohio chose not to disturb any of the rulings of the First District Court of Appeals.

ARGUMENT

1. PETITIONERS' "DUE PROCESS" ARGUMENT

The arguments and authorities on pages 13-15 of petitioners' brief would have had validity, if at all, in petitioners' original and successful appeal to the First District Court of Appeals. To the extent it was conceivable that the reception of any evidence, or the need for some further hearing, could, by the wildest stretch of judicial imagination, have a bearing on the coverage issue, petitioners had their opportunity upon remand. The decisions of this Court cited by petitioners do not, even remotely, suggest that any of the proceedings in any of the courts below in the case at bar were "void," at least in the sense used by petitioners.

In *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915), a state statute permitted execution upon the property of a shareholder in order to satisfy a judgment against a corporation. This taking of the shareholder's property was accomplished without any sort of hearing at which he could be heard. Clearly, this is light years away from the present case, even as it is recounted by petitioners.

In *Armstrong* v. *Manzo,* 380 U.S. 545 (1965), an adoption went forward to completion without any notice to the child's natural father, even though his whereabouts were known. This no notice/no service situation is one which bears no similarity to the case at bar.

2. PETITIONERS' "CLEARLY ERRONEOUS" ARGUMENT

On page 15 of their brief, petitioners contend that the Court of Appeals ignored error in the trial court because the "result" there was correct. We suggest that this is an unfair characterization of a court which did reverse at petitioners' behest (after which petitioners failed utterly to make good on their promise to produce evidence that the Muscovins had negotiated a policy with different provisions than the printed contract.) All that the Court of Appeals did was to respond, as it was required to do, to claims of error made by petitioners with respect to the substantive issue of policy construction.

At the same point in their brief, petitioners assert that the Ohio courts erred (in a constitutional sense, it is to be presumed) when they held that petitioners were required, at their peril, to appeal the decision of the First District Court of Appeals in the first appeal, Case No. C-73253. In other words, petitioners are apparently arguing that, having taken steps which required the Court of Appeals to make a determination on a question of substantive law and having obtained an undesired result in that quest, they could still have a second chance to start over, as it were, on that substantive issue. Put in more legalistic terms, petitioners contend that Ohio's implementation of the doctrine of "the law of the case" is violative of some provision of the Constitution of the United States.

No case so holding has been cited by petitioners. We have already distinguished the *Coe* and *Armstrong* decisions. The case of *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), is another no service/no notice situation in no way similar to any issue in the present case. The case of *Ex parte*

Siebold, 100 U.S. 371 (1879), involved a criminal conviction under an unconstitutional statute, a situation which makes it totally inapplicable to the case at bar.

On at least two occasions, this Court has been confronted with contentions that an issue under the Constitution of the United States was raised by a state's interpretation of its "law of the case" doctrine. In *King* v. *West Virginia,* 216 U.S. 92 (1910), it was specifically held that no such constitutional issue is presented. At page 100 of the opinion of Mr. Justice Holmes, the following appears:

> "The highest court of the state is the final judge of the powers conferred by the state laws in that regard."

The *King* opinion was followed in *Moss* v. *Rainey,* 239 U.S. 538 (1916). At pages 184 and 185 of the opinion, the Court says this:

> "It is contended that the decision upon the first appeal became the law of the case, and that by recalling that decision when considering the second appeal the court infringed upon the due process of law clause of the 14th Amendment. The contention must fail. There is nothing in that or any other clause of the 14th Amendment which prevents the state from permitting an appellate court to alter or correct its interlocutory decision upon a first appeal when the same case, with the same parties, comes before it again; and *whether this is permitted is a question of local law, upon which the decision of the highest court of that state is controlling here.*" (emphasis supplied)

It stands to reason that, if no Fourteenth Amendment due process issue is presented when one state does not apply a "law of case" doctrine, the same result obtains when a second state does apply that doctrine.

On page 16 of their brief, petitioners contend that, in the first appeal, the Court of Appeals had "no jurisdiction to affirm" the allegedly tainted result in the trial court. An examination of the opinion of the Court of Appeals (Appendix D of petitioners' brief) and of that court's entry (Appendix E thereof) fails to find the word "affirm" in either.

Moreover, assuming *arguendo* that the original proceedings in the Hamilton County Common Pleas Court were somehow "tainted," there is no suggestion of any such "due process" flaw in the manner in which the Court of Appeals addressed itself to the issues originally presented to it in the first appeal, Case No. C-73253. By its ruling in the second appeal, Case No. C-77839, the First District Court of Appeals made it clear that its previous ruling in the first appeal was an appealable order which could have formed the basis of appeals to the Ohio Supreme Court and, later if necessary, to this Court. The Supreme Court of Ohio had an opportunity to disagree with the Court of Appeals' understanding of what constituted a final appealable order, but it did not. Petitioners have not attempted to cite any case implying that a constitutional issue can be made out of a state's determination of what is, or what it not, an appealable order by an intermediate appellate court.

In fact, this Court has addressed itself to that very question and has answered it in the negative. In *John* v. *Paullin,* 231 U.S. 583 (1913), at page 585, Mr. Justice Van Devanter said this:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable

> when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Shortly after this language, the following appears in the same opinion:

> "Besides, the mode of subjecting the judgments of the state's subordinate courts to review in its supreme court was a matter of local concern only, and not within the control of Congress."

The first of the two above excerpts from *John* was quoted with approval by Mr. Justice Stewart in the majority opinion in *Wolfe* v. *North Carolina,* 364 U.S. 177 (1960), at page 195.

All of the Ohio cases appearing on pages 16 and 17 of petitioners' brief were cited by them to the Supreme Court of Ohio, where they failed to impress that tribunal. We see no need to comment upon them any further in this brief.

The case of *Ford Motor Co.* v. *National Labor Relations Board,* 305 U.S. 364 (1939), cited on page 17 of petitioners brief, is devoted exclusively to issues dealing with the 1938 method of review of decisions of the NLRB by the Circuit Courts of Appeal. The very first sentence in the Opinion of Mr. Chief Justice Hughes is this (page 365):

> "This case presents a question of the propriety of the action of the Circuit Court of Appeals in remanding a cause to the National Labor Relations Board for the purpose of setting aside its findings and order, and issuing proposed findings, and making its decision and order upon reconsideration."

Later (at page 374) the Chief Justice further refines that statement as follows:

> "The present controversy thus comes to the narrow point that, instead of setting aside the Board's findings and order, the court has allowed the Board itself to set them aside."

Nowhere in the 13 page opinion in *Ford Motor Co.* is there a single mention of any provision of the United States Constitution, or of any point which might be termed a constitutional issue. Nowhere does the opinion of Mr. Chief Justice Hughes remotely suggest any error in any action taken by any of the courts below in the present case, and the citation of the *Ford Motor Co.* case by petitioners betrays the proverty of their case in this Court.

3. PETITIONERS' "AFFIDAVITS" ARGUMENT

The first argument made by petitioners in this portion of their brief (pages 18 and 19 thereof) is another effort by them to have this Court intervene in another purely state law area, Ohio's "law of the case" doctrine.

If, as contended on page 18 of petitioners' brief, the First District Court of Appeals "disregarded the Ohio case law" on the interpretation of a prior unappealed appellate decision, it was for the Supreme Court of Ohio to set matters straight. To this end, petitioners cited to that court all of the Ohio cases which appear on page 19 of their brief in this Court, but that court was totally unimpressed, apparently relying on numerous other Ohio cases, much more in point and contrary to petitioners' arguments. Those cases include *State ex rel Potain* v. *Matthews,* 59 Ohio St. 2nd 29, 391 N.E.2nd 343 (1979); *Sheets* v. *Hodes,* 142 Ohio St. 559, 53 N.E.2nd 804 (1944), affirming 39 O.L.A. 492, 68 N.E.2nd 342 (App. 1943); *Trout* v. *Tipton,* 106 Ohio App. 537, 153 N.E.2nd 158 (1958); *Gottfried* v. *Yocum,*

72 O.L.A. 343, 133 N.E.2nd 389 (1953) M.C.O. 1/18/56; *Anderson* v. *Wolf,* 21 O.L.A. 86 (App. 1935); *Wells* v. *Anchor Cartage & Storage Co.,* 38 Ohio App. 358, 176 N.E. 680 (1930); and *Breuer* v. *Frank,* 3 O.N.P. (N.S.) 581 (Super. 1905), affirmed 74 Ohio St. 519 (1906).

The same comments can be made about petitioners' argument, on pages 19 and 20 of their brief, based upon Rule 54 (B) of the Ohio Rules of Civil Procedure, an argument made for the first time in this Court and one which could properly have been addressed only to an Ohio court.

We are in complete agreement with petitioners' assertion, on page 20 of their brief, that the United States Constitution is controlling in state courts. We point out, however, that in the corresponding portion of their brief petitioners cite no authority suggesting any constitutional issue in the present case.

We now turn to petitioners' final argument, the contention that it was error, worthy of this Court's attention, for the Ohio courts not to have ruled in their favor, after the remand, because of the four grammarians' affidavits.

There are several answers to this argument, but before setting them forth we wish to correct several additional errors in petitioners' brief. One is the assertion (page 21 thereof) that Judge Matthews "precluded" petitioners from offering "such evidence" as the grammarians' affidavits. The fact of the matter is that petitioners never filed any writing with Judge Matthews mentioning grammarians prior to their notices of appeal from his decision.

The second error is petitioners' contention that, after remand, the trial court "disregarded" their affidavits. If, by this, petitioners mean that the trial court, either *sua sponte* or upon respondent's motion, struck the affidavits from the file, or made some written or oral statement to

the effect that the affidavits would not be considered, they are completely in error. Just the opposite appears in the Record. Appendix D hereof is the letter opinion of Judge Frank M. Gusweiler sent out under date of October 12, 1977. Appendix E hereof is the order entered by him on December 2, 1977. Both refer, among other things, to "the affidavits" as being material considered by the court in coming to its decision (14a-18a of respondent's brief).

On the other hand, if petitioners mean that Judge Gusweiler "disregarded" the grammarians' affidavits because of very compelling legal reasons rendering them, as a matter of law, of no consequence, then they are entirely correct. Indeed, we assured the Ohio courts that, if factual evidence of policy construction were properly receivable in the case at bar, we could produce our grammarians' affidavits contrary to those offered by petitioners. This would force the court or a jury to select which four professors' version to believe. We said that, while perhaps there are flaws in the American system of justice, the last thing that it needs is to be turned over to squads of English professors.

However, for at least two very good reasons, such a choice was properly deemed unnecessary by the Hamilton County Common Pleas Court after remand. One such reason was the efficacy of the prior decision and limited remand of the Court of Appeals, a decision which petitioners could have appealed but did not. A second reason is the unanimous body of law which has construed the Muscovin policy format and language, as a matter of law, just as the Ohio courts have construed it in the case at bar. The leading decision is *Bright* v. *Ohio Casualty Insurance Company*, 444 F. 2d 1431 (6 Cir. 1971), a case decided under Ohio law. *Bright* holds that the policy language is *not* ambiguous and that, because of the format

and the language of the policy, the "provided" clause applies, as a matter of law, to "the named insured" as well as to "any relative."

The result in *Bright* has also been the result reached in every single other decision in which the same policy format and language has ever been construed. The cases arriving at this unequivocal result include *State Automobile Mutual Co.* v. *Williams*, 302 A.2d 627 (Md. 1973); *Downey* v. *Motor Vehicle Accident Indemnity Corp.*, 350 N.Y.S.2d 821 (App. Div. 1973); *Stevenson* v. *Comeaux*, 296 So.2d 267 (La. 1974); and *Bilstein* v. *Porter*, 548 P.2d 255 (Colo. App. 1976).

The substantive Ohio Law on insurance policy interpretation in situations where the language and format are unambiguous *requires* construction as a matter of law. This is the body of Ohio authority referred to by the First District Court of Appeals in Footnote 3 of its opinion in the second appeal, Case No. C-77839 (27a and 28a of Petitioner's Brief) and includes such decisions as *Garlick* v. *McFarland*, 159 Ohio St. 539, 113 N.E.2d 92 (1953); *Olmstead* v. *Lumberman's Mutual Insurance Company*, 22 Ohio St.2d 212, 259 N.E.2d 123 (1970); *Jirusek* v. *Prudential Insurance Co.*, 27 Ohio St.2d 62, 271 N.E.2d 866 (1971); *Motorists Mutual Insurance Co.* v. *Tomaski*, 27 Ohio St.2d 222, 271 N.E.2d 924 (1971); *Jackson* v. *Metropolitan Life Insurance Co.*, 34 Ohio St.2d 138, 296 N.E.2d 679 (1973); *Travelers Insurance Co.* v. *Reddick*, 37 Ohio St.2d 119, 308 N.E.2d 454 (1974); and *Alexander* v. *Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978).

When a provision in an insurance policy is subject to construction as a matter of law (as this one is in all of the jurisdictions which have ever been confronted with it), then there could never be any need to resort to testimony,

expert or otherwise, to construe it (the "squads of English professors" situation). In *Home Insurance Co.* v. *Continental Insurance Co.,* 180 N.Y. 389, 73 N.E. 65 (1905), it was specifically held that, when the meaning of language in an insurance policy has been settled by the courts, the testimony of experts on the proper construction of the policy is inadmissible. This decision has been followed in such other cases as *McNally* v. *American States Insurance Co.,* 308 F.2d 438 (6 Cir. 1962); *Clifton Shirting Co.* v. *Bronne Shirt Co.,* 209 N.Y.S. 709 (App. Div. 1925); and *Keber Straw Hat Corp.* v. *Lincoln,* 239 App. Div. 727, 268 N.Y.S. 745 (1934).

Four sets of able, resourceful and persistent counsel for petitioners, all of them fiercely dedicated to finding some authority contrary to *Bright,* have had almost 13 years to find such a case but have failed to uncover a single authority to support their construction of the Muscovin policy. Given the unanimously followed construction of this provision and the Ohio rule on the construction of unambiguous insurance policy language, it would be obvious error for an Ohio court to receive "expert" testimony such as that suggested by petitioners on pages 23 and 24 of their brief. To put it another way: if this Court were to take jurisdiction on the merits and reverse and remand the case to the Hamilton County Common Pleas Court, is there some principle of constitutional law which would require that court to treat the policy construction issue as a question of fact (contrary to the *Bright* and *Olmstead* lines of cases), so as to submit the grammarians' testimony to a trier of the facts?

Petitioners have cited no authority so suggesting, and we submit that such an issue as the substantive law of insurance policy construction, both in general and with respect to the particular insurance policy involved in this

case, has always been, and remains, a matter which each state is free to determine for itself. The Congress, in enacting the McCarran-Ferguson Act, 15 U.S.C. #1011 et seq., specifically declared that the regulation of the insurance business by the several states was in the public interest and made the business of insurance subject to the laws of several states. This Court, in *Mutual Life Insurance Company of New York* v. *Johnson,* 293 U.S. 335 (1934), a pre *Erie* decision, specifically held that, in a matter of insurance policy construction, it saw fit to yield to the decisions of the state under whose law the contract of insurance would ordinarily be construed. This decision was subsequently followed by this Court in *Ruhlin* v. *New York Life Insurance Company,* 304 U.S. 202 (1938), in which it is held that questions arising in the federal courts concerning the proper construction of contracts of insurance are governed by the decisions of the appropriate state court.

In the Ohio courts, petitioners made the same argument which appears on page 22 of their brief in this Court, the insistence that some critical difference in policy construction is created by the employment of the pronoun "his" in one contract and the employment of the article "the" in the other. Obviously, the Ohio courts have rejected this assertion. In his *King* opinion Mr. Justice Holmes held that the claimed misconstruction of a state statute by a state court cannot present a question of which this Court should take cognizance. The same rationale would apply, we submit, to petitioners' "his" versus "the" argument.

CONCLUSION

We believe that the foregoing Argument portion of this brief has successfully demonstrated that this case does *not* present to this Court any "due process" or other constitutional issue over which it should assume on-the-merits jurisdiction. Rather, the issues which shaped the case at bar into its present posture are purely state-law issues, that is, those suggested in the Question Presented at the beginning of this brief.

We urge, therefore, that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

Ambrose H. Lindhorst
LINDHORST & DREIDAME
1200 American Building
Cincinnati, Ohio 45202
421-6630

OF COUNSEL:

James L. O'Connell
1200 American Building
Cincinnati, Ohio 45202
421-6630

APPENDIX A

COURT OF APPEALS
HAMILTON COUNTY, OHIO
FIRST APPELLATE DISTRICT OF OHIO

No. C-73253

HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased, et al.,
Plaintiffs-Appellants,

vs.

JON ALLEN MUSCOVIN, et al.,
Defendants-Appellees.

APPLICATION FOR RECONSIDERATION AND FOR MODIFICATION OF JUDGMENT ENTRY

(Filed October 21, 1975)

Come now Henry Neuhausser, Administrator of the Estate of Stephen Neuhausser, Deceased, Ronald Ison, Edna Ison Scott, and Edward E. Koehl, Administrator of the Estate of Carol E. Koehl, Deceased, Plaintiffs-Appellants, and make Application to the Court for reconsideration of the Decision and Judgment entered herein.

Said Plaintiffs-Appellants move that a portion of the Decision and Judgment of the Court be stricken and otherwise modified so as to include no determination as a matter of law that the language of the policy of the United States Fire Insurance Company, in the absence of modification

by the agent or broker excluded coverage of Jon Allen Muscovin, and his mother, Amelia Muscovin. They also move that the Judgment Entry in this case be modified so as to conform to the Decision.

This Court having determined that the Plaintiffs-Appellants were unjustifiably denied a trial, the determination as to the legal effect of the insuring clause of the policy issued by the United States Fire Insurance Company, Defendant-Appellee, was not necessary, relevant, or proper for its Decision and Judgment and constitutes surplusage without binding legal effect.

. . . . . .

WALTER BEALL, Attorney for
Henry Neuhausser, Admr., Plaintiff-Appellant

. . . . . .

STANLEY M. CHESLEY, Attorney for
Ronald Ison and Edna Ison Scott,
Plaintiffs-Appellants

. . . . . .

HYMAN B. ROSEN, Attorney for
Edward E. Koehl, Admr., Plaintiff-Appellant

ARGUMENT

Under *Article IV, Section 3 of the Ohio Constitution,* the Court of Appeals may affirm, reverse or modify, Judgments or Final Orders of inferior Courts. Also in *Article IV, Section 1, of the Ohio Constitution* there is a grant of "judicial power" to the Courts. "Judicial power" could not conceivably extend to the partial affirmance of the decision of a Court where no trial was had, as in this case.

By its Decision, the Court of Appeals has denied Plaintiffs-Appellants the right to present expert testimony and evidence on the grammatical construction and effect of the insuring clause as well as the rest of the policy. Thus, the Court of Appeals has withdrawn an issue of fact from determination in the Trial Court without any evidence to support its decision.

Such Decision of the Court of Appeals violates the rights of the Plaintiffs-Appellants, under *Article I, Section 5, and Article I, Section 15 of the Ohio Constitution and Article I of the 14th Amendment of the United States Constitution* and deprives them of "due process of law," which includes the right to a complete impartial hearing at which evidence can be presented and the issues argued on the basis of such evidence.

In view of the fact that the Decision found that the Plaintiff had been denied a right to a trial, all proceedings in the Trial Court were necessarily void. Therefore, this Court should not have attempted to pass on issues which relate to the merit of the cause. Such findings by the Court of Appeals on the merits does not constitute an exercise of "judicial power" on its part. As a matter of fact, such findings were irrelevant and not necessary to the Decision.

Plaintiffs have not submitted this case for a determination of substantial law or on its merits. The latter phase was argued in view of the position of the United States Fire Insurance Company that they were not entitled to a trial. In case this Court agreed with such position, Plaintiffs presented Arguments on substantial issues so that there would be no default on the part of the Plaintiffs. Reference is made to P. 4 of Plaintiffs' Reply Brief wherein their position is clearly stated:

"While it is plaintiffs' position that the proceedings

in the trial court are so irregular and in violation of the existing law and rights of the plaintiffs as to make the same void, and requires a reversal without a discussion of the substantive law involving the interpretation of the policy, nevertheless, since the matter has been raised in the brief counsel has argued the substantive law."

The Supreme Court of Ohio in *Middleport Woolen Mills Co.* v. *Titus,* 35 Oh. St. 253, 256, held that where the Supreme Court had affirmed the judgment of the Court of Appeals in reversing a judgment of the Trial Court on the ground of the weight of the evidence, the Supreme Court was not warranted and would not pass on other errors assigned which were not necessary to the Decision or Opinion. As a matter of fact, on P. 258 the Court stated:

"The view that we have taken of this case renders it unnecessary that we should determine the important questions discussed by counsel, or express any opinion as to the real merits of this case in any particular."

The foregoing ruling of the Ohio Supreme Court was an affirmance of the law which has its inception in the earliest reported cases of our state. Thus, in *Stewart* v. *Southard,* 17 Oh. 402, 406, the Court held in discussing the limitations of "judicial power:"

"It is our duty to decide such questions only as become necessary to ascertain the rights of the parties litigant and are legitimately presented upon the record and we cannot admit that parties have the power to call for a right not thus presented, and which is out of the case."

It is also well established that a Court cannot render an advisory opinion without a trial and affording parties the right to present evidence. In addition, a Court cannot by

an advisory opinion determine what evidence is admissible or what procedure should be followed in the Trial Court. *U.S. Fidelity Ins. Co.* v. *Savoy Grill, Inc.,* 51 Oh. App. 504., *State ex rel. Reams* v. *McNary,* 54 Oh. App. 496.

There are other cases which hold that the Appellate Court should not render an Opinion on matters not before it, or which are not necessary for the Decision of the Court. Thus, in *Ford Motor Co.* v. *National Labor Relations Board, 305 U.S. 364,* the Supreme Court of the United States held that where there had been a lack of a full and fair hearing in the tribunal below which had not afforded the Petitioner an opportunity to be fully heard and to present his evidence, the tribunal on remand from the Supreme Court, must start anew and permit a full and complete trial of the entire issue. In this case the tribunal was the National Labor Relations Board.

It should also be considered that in the Narrative Statement of the Proceedings from the Trial Court in this case the Trial Court certified on P. 5 to this Court the following:

"Counsel for the Plaintiffs and the Muskovins also stated to the Court that they had evidence to present to the Court, including expert testimony, and evidence relating to the interpretation of the policy and other evidence to show it was an operator's policy, not requiring consent of the owner of the Koehl vehicle."

In addition the Court further certified on P. 5

"That he would not allow any party to present evidence."

It should thus be apparent that there was an issue of fact which related to the interpretation of the policy involved, recognized by both the Plaintiffs' and the Defendants' counsel. Counsel for the United States Fire Insur-

ance Company in the exchange of correspondence with counsel for Koehl referred to an offer to the Trial Court to present expert testimony, and other evidence relating to the interpretation of the policy, so that the insurance company recognized that there was a bona fide factual issue on the matter.

There is ample law that the construction or interpretation of a policy or a contract many times is an issue of fact for the jury rather than for the Court. The general rule is that when the policy or contract is not in any way vague or capable of two constructions, then the construction or interpretation of the policy or contract is for the Court. On the other hand, where there is vagueness, ambiguity, or uncertainty concerning the language of the contract or policy, it then becomes an issue of fact for the jury. This is exactly the situation which existed before Judge Matthews in this case, as is apparent by the certification made by him to this Court of the contentions and offers by counsel on the hearing of their Motions to Set Cases for Trial. The rule of law referred to is well set forth in the case of *Amstutz, Admr.* v. *The Prudential Ins. Co. of America,* 135 Oh. St. 404, 408. We quote from page 408 of this Opinion

> "While it is the function of a court to construe a contract, it is the province of the jury to ascertain and determine the intent and meaning of the contracting parties in the use of uncertain or ambiguous language. By the use of the term 'instructions,' and particularly in the light of the testimony of Mr. Shindollar that 'Mr. Speiser, of course, could instruct him (Shultz) to do anything * * *,' the trial court was warranted in finding that a jury may reasonably infer from the evidence that appellant intended to reserve to itself the right to control the physical acts of Shultz as they relate to the instant case, and that, by reason

> thereof, there existed between the two the relationship of master and servant."

It is a well established rule of law that an expert may testify as to matters which are generally not within the knowledge of the jury, or which by the use of the expertise of the expert would better inform and assist the jury. The Rule, as is stated in *12 Oh. Jur. (2d 418 Sect. 410.)* sets forth the reason for the admission of the testimony of an expert is that: "He knows those things within the field of his specialty which the average man does not know." Also, it was stated in this same reference, that an expert should be permitted to testify because from the nature of his calling he is "better able to judge matters relating thereto than one not an expert." It must be admitted that the language of insurance policies generally is difficult for the layman to understand. It is even difficult in many cases for lawyers or judges to understand or interpret such policies. There can also be no argument that a man who is skilled in the English language, such as a Professor or a Grammarian is better able to interpret such language on the basis of grammatical interpretation and construction which is applied universally in construing the English language. Thus, the Court of Appeals, by its Opinion has denied the Plaintiffs the right to present such evidence which is not only competent but which is relevant to an important issue of fact.

Plaintiffs also request that the Judgment Entry of the Court of Appeals entered herein be modified, in view of the fact that the Court of Appeals in its Decision stated on Page 7: "The four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law which include Trial Settings upon the pending Supplemental Complaints filed by the Plaintiffs-Appellants." This finding is in conflict with the Judgment

Entry which states: "It is, therefore, Ordered by the Court that the four cases are remanded to the Hamilton County Court of Common Pleas for further proceedings according to law, which *may* include trial settings upon the pending Supplemental Complaints filed by the Plaintiffs-Appellants." It appears that the Judgment Entry and Decision are in conflict, since the Decision found that there was no trial accorded to the Plaintiffs, and therefore, they were entitled to a trial setting. On the other hand, the Entry makes it discretionary as to whether or not there should be any trial settings. Plaintiffs contend that the Entry should conform to the Decision.

It is, therefore, submitted by the Plaintiffs that the Decision and Judgment of the Court of Appeals in this case should be reconsidered and that they should be modified in accordance with the requested Application, argument, and authorities heretofore cited by the Plaintiffs.

Respectfully submitted,

.....

WALTER BEALL,
Attorney for Henry Neuhausser,
Admr. Plaintiff-Appellant

.....

STANLEY M. CHESLEY,
Attorney for Ronald Ison and
Edna Ison Scott, Plaintiffs-
Appellants

.....

HYMAN B. ROSEN,
Attorney for Edward E. Koehl,
Admr. Plaintiff-Appellant

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX B

AFFIDAVIT

STATE OF OHIO)
) SS
HAMILTON COUNTY)

Alfred J. Muskovin, being first duly sworn deposes and says under oath that he resides at 112 Harrell Street, Greeneville, North Carolina, 27834, and that his profession is that of an Engineer with Proctor and Gamble Company. Prior to January 24, 1975 he resided at 6478 Teakwood Court, Cincinnati, Ohio.

Affiant further says that he is married to Amelia C. Muskovin and they are the parents of Jon Allen Muskovin. That prior to July 6, 1966 he was the insured in a policy of insurance issued by the United States Fire Insurance Company to himself and his wife Amelia C. Muskovin, which is Policy Number FAC51 59 74 which was an automobile insurance policy which covered bodily injury liability, property damage liability, and which had other coverages thereon. The automobile primarily insured by this policy was a 1965 Oldsmobile F-85 4-Door Deluxe automobile, which was Mr. Muskovin's car.

Affiant states that in August of 1962 he removed to Cincinnati from Twinlake, Michigan and prior thereto he had been advised to contact Robert W. Vogt, an insurance broker in Cincinnati for the purpose of covering all of his needs of insurance. As a result thereof, he promptly contacted Mr. Vogt and until the time he removed to Greeneville, North Carolina, Mr. Vogt wrote all the insurance, other than life insurance, which he required. He wrote the Homeowner's Policy and he wrote the insurance policy

on his automobile. During the minority of his older daughter, Marie, who was approximately three years older than his son Jon, Mr. Vogt had covered her in the policy of insurance which he had written to the Muskovins. However, at the time of the accident involved on January 26, 1967, Marie was a student at the College of Nursing at the University of Cincinnati, lived on the campus, had her own automobile and was not an insured under the policy of her parents.

On July 5, 1966, Affiant remembers a telephone conversation with the secretary of Mr. Vogt, whom he knew by the name of Mary Lou. During the years that he dealt with Robert Vogt, he had met Mr. Vogt on one occasion, although he had had many telephone conversations with him, and in most cases he had referred him to his secretary, Mary Lou, for service. As a result, he got to know Mary Lou very well, knew her voice and she was the person with whom he talked on July 5, 1966 in regards to the coverage of his son, Jon Allen Muskovin on his automobile insurance policy. On that occasion, he called the Vogt Agency and he spoke to Mary Lou. He told Mary Lou that his son Jon Allen had reached the age of sixteen and had received a driver's license. As he best recollects, he states that his conversation with Mary Lou consisted of his statement to her: "I need insurance coverage for Jon, my son, because he now has a driver's license, and I want him fully covered." Mary Lou then told the Affiant what the charge would be for covering him, on Mr. Muskovin's policy, and Affiant told her to go ahead and do so, and Mary Lou stated that he would be covered immediately. Thereafter an endorsement was made on the policy of insurance previously referred to which had been issued to Mr. and Mrs. Alfred J. Muskovin, which was effective on July 5, 1966 and which purported to cover

"Jon Allen Muskovin as "added operator". This endorsement was signed by Mr. Vogt.

It was the understanding of Mr. Alfred J. Muskovin that he was purchasing insurance which would fully cover his son, Jon Allen Muskovin, and at the same time cover himself and his wife as parents of their son. He had asked for coverage for his son, Jon Allen, and he understood he was getting such coverage which would protect his son and him and his wife at all times while he was operating an automobile during his minority.

Affiant states that he believed that he and his wife and his son should be covered by insurance, and at the same time he wanted to protect the public against the operation of an automobile by his son by having insurance. Otherwise, there would have been no purpose in obtaining insurance for his son who was not financially responsible in the event of an accident. He was thus motivated by what he thought was a legal and moral responsibility. Affiant was accordingly very much amazed when he was advised after the accident that the United States Insurance Company had determined the policy did not cover the accident.

/s/ ALFRED J. MUSKOVIN

Sworn to before me and subscribed in my presence this 16th day of January, 1976.

/s/ HYMAN B. ROSEN,

NOTARY PUBLIC
STATE OF OHIO

APPENDIX C

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-232481, A-235284, A-235385, A-236200

HENRY NEUHAUSSER, Administrator of the Estate of Stephen Neuhausser, Deceased, et al.

Plaintiffs,

v.

JON ALLEN MUSCOVIN, et al.,

Defendants.

AFFIDAVIT OF ROBERT W. VOGT

(Filed August 22, 1977)

STATE OF OHIO)
) SS
HAMILTON COUNTY)

ROBERT W. VOGT, being first duly cautioned and sworn, deposes and says that he is the insurance agent who, at various times during the period in which Mr. Alfred J. Muskovin and his family resided in the Cincinnati area, wrote various policies on him and members of his family.

Affiant further says that he is the Robert W. Vogt re-

ferred to in the affidavit of Alfred J. Muskovin recently filed in the within actions.

Affiant further says that he has no personal knowledge of the telephone conversation allegedly had between Mr. Muskovin and an employee of the affiant on July 6, 1966; but that as a result of some contact of the affiant's office by Mr. Muskovin at or about that time, the existing insurance coverage on Alfred J. and Amelia C. Muskovin was endorsed so as to include Jon Allen Muskovin as an added operator.

Affiant further says that, to the knowledge of the affiant as of both 1966 and the present time, the addition of Jon Allen Muskovin as an added operator on his parents' automobile liability insurance policy "fully covered" Jon Allen Muskovin in the sense that it provided him with as much protection as was possible under any kind of automobile liability insurance policy.

Affiant further says that if a non-owned automobile policy or a so-called "operator's policy" could have been written at that time, such a policy would have contained an exclusion to the effect that coverage was denied to the insured while he was operating a motor vehicle without the permission of the owner of that motor vehicle, in other words, an exclusion containing essentially the same language as that which did appear in the automobile liability insurance policy issued to the parents of Jon Allan Muscovin.

Further affiant saith naught

.....

Robert W. Vogt

Sworn to before me and subscribed in my presence this day of August, 1977.

.....

Notary Public

APPENDIX D

[LETTERHEAD OF HAMILTON COUNTY
COURT OF COMMON PLEAS]

October 12, 1977

Mr. Hyman B. Rosen
Attorney for Plaintiff
Edward E. Koehl, Administrator
Rosen and Rosen
1005 First National Bank Building
Cincinnati, OH 45202

Mr. James L. O'Connell
Attorney for Defendant
United States Fire Insurance Co.
Lindhorst & Dreidame
1200 American Building
Cincinnati, OH 45202

Mr. Russell W. Renner
Attorney for Defendants
John A. and Amelia C. Muskovin
Wesselman & Renner
3526 Glenmore Ave.
Cincinnati, OH 45211.

**Re: Henry Neuhausser, Administrator, et al. vs.
John A. Muskovin, etc., et al.
Nos. A-232481, A-235384, A-235385,
A-236200**

Gentlemen:

The four above cases having been consolidated, this matter is before the court on a motion for summary judgment in behalf of the defendant United States Fire Insurance

Co., and various other motions on behalf of the plaintiffs and other defendants.

After oral arguments and a review of the pleadings, together with the affidavits, briefs and authorities submitted, this court is of the opinion that the motion for summary judgment by the defendant (United States Fire Insurance Co.) is well taken and grants same. All other motions, i.e., to strike, to amend and to add defendant are hereby denied.

You may present appropriate entries.

Very truly yours,

/s/ FRANK M. GUSWEILER
Frank M. Gusweiler, Judge

FMG:jh

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-232481, A-235284, A-235385, A-236200

HENRY NEUHAUSSER, Administrator of the
Estate of Stephen Neuhausser, Deceased, et al.

Plaintiffs,

v.

JON ALLAN MUSCOVIN, et al.,

Defendants.

ENTRY GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT UNITED STATES FIRE INSURANCE COMPANY, AND OVERRULING MOTIONS OF PLAINTIFFS AND OF DEFENDANTS JON ALLEN MUSCOVIN AND AMELIA MUSCOVIN FOR SUMMARY JUDGMENT, TO STRIKE MOTION FOR SUMMARY JUDGMENT OF UNITED STATES FIRE INSURANCE COMPANY AND FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINTS

(Filed December 2, 1977)

Each of the four within actions has come on before the Court for hearing upon the following separate motions:

1. The motion of the defendant, United States Fire Insurance Company, for summary judgment.
2. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, to strike the said motion for summary judgment of the defendant, United States Fire Insurance Company, from the file.
3. The motions of the plaintiffs and of Jon Allen Muscovin and Amelia C. Muscovin for summary judgment.
4. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, for leave to file amended and supplemental complaints against United States Fire Insurance Company.
5. The motions of the plaintiffs and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin, to add Robert W. Vogt as an additional party defendant and to file amended and supplemental complaints and/or a cross-claim against him.

The aforesaid motions came before the Court on the pleadings, the stipulations, affidavits, memoranda and oral arguments of counsel, and the Court, upon consideration, finds the motion for summary judgment of the defendant, United States Fire Insurance Company, well taken and grants the same and hereby and herewith enters final judgment in each of the four within actions in favor of the defendant, United States Fire Insurance Company, and against the plaintiffs and the defendants, Jon Allen Muscovin and Amelia C. Muscovin, at the costs of the

plaintiffs, and of the defendants, Jon Allen Muscovin and Amelia C. Muscovin.

The Court further finds each and every one of the remaining aforesaid motions not well taken, and each and every one of the remaining aforesaid motions is hereby and herewith overruled.

Appropriate exceptions are reserved to the parties.

. . . . . .

/s/ STANLEY M. CHESLEY
Attorney for Ison

/s/ WALTER C. BEALL
Attorney for Neuhausser

/s/ RUSSELL W. RENNER
Attorney for Jon Allan Muscovin
and Amelia Muscovin

/s/ HYMAN B. ROSEN
Attorney for Edward E. Koehl,
Administrator of Carol E. Koehl

/s/ James L. O'Connell
Attorney for deft. U. S. Fire